CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

JOCELYNNE FALLGATTER and JEFF KIRKMAN,	)	**Case No. 06-3-0003**
Petitioners,	)	***(Fallgatter V)***
v.	)	
CITY OF SULTAN,	)	**ORDER REGARDING DISQUALIFICATION OF BOARD**
Respondent.	)	

I. BACKGROUND

On January 20, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Petitioners Jocelynne Fallgatter and Jeff Kirkman (**Petitioners or Fallgatter**). The matter was assigned Case No. 06-3-0003, and is hereafter referred to as *Fallgatter V*. Board member Margaret A. Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Sultan's (**Respondent** or **City**) adoption of Ordinances 897-05 and 898-05, adopting water and sewer plans, and Resolution 05-18, adopting the Transportation Improvement Program (**TIP**), as non-compliant with the GMA. Petitioners also challenge the failure of the City to act to update and amend various elements of its Comprehensive Plan and development regulations.

On February 23, 2006, the Board issued its "Prehearing Order" (**PHO**) in this matter. The PHO established the briefing schedule, hearing date and date the final decision and order is due.

On April 24, 2006, the Board issued its "Order on Motions" (**OoM**). The OoM **granted** Petitioners' motion to supplement the record on several items and **denied** the City of Sultan's motion to dismiss several Legal Issues for lack of subject matter jurisdiction.

On April 27, 2006, the Board attended its Semi-Annual Joint Board Meeting in Olympia, Washington, with members of the Eastern and Western Growth Management Hearings Boards. *See* RCW 36.70A.270(9) and WAC 242-02-076(2).

On May 25, 2006, the Board received "Respondent City of Sultan's Response Brief" (**Sultan Response**) in this matter. Included in Sultan's Response is a motion to disqualify the Board [all three CPSGMHB members] and dismiss the PFR. The motion

is based upon alleged ex parte communications that occurred at the April 27, 2006, Semiannual Joint Boards Meeting in Olympia.

On June 1, 2006, the Board received Fallgatter's "Rebuttal to Respondent City of Sultan's Response Brief" (**Fallgatter Reply**).

II. DISCUSSION and ANALYSIS

A. Applicable Law

RCW 36.70A.270 provides, in relevant part:

> (7) All proceedings before the board, any of its members, or a hearing examiner appointed by the board shall be conducted in accordance with such administrative rules of practice and procedures as the boards jointly prescribe. . . [The Boards are required to jointly adopt and publish rules of practice and procedure governing board proceedings.] Except as it conflicts with specific provisions of this chapter, the administrative procedures act, chapter 34.05 RCW, and specifically RCW 34.05.455[1] governing *ex parte communications*, shall govern the practice and procedure of the Boards.
>
> (8) *A board member or hearing examiner is subject to disqualification under chapter 34.05 RCW. The joint rules of practice of the boards shall establish procedures by which a party to a hearing conducted before the board may file with the board a motion to disqualify*, with supporting affidavit, against a board member or hearing examiner assigned to preside at the hearing.

(Emphasis supplied).

The Boards' Joint Rules of Practice and Procedure, at WAC 242-020-130 provide:

> *No one in a board proceeding shall make or attempt to make any improper ex parte communication with board members, hearing examiners, or presiding officers, regarding any issue in the proceeding that is prohibited by the Administrative Procedures Act, RCW 34.05.455.* Communications on purely procedural matters such as scheduling and logistics are permitted on an ex parte basis. Attempts by anyone to make a prohibited ex parte communications shall subject such person to the provisions of WAC 242-02-120[2] and 242-02-720.[3]

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[1] *See* Appendix A for the text of RCW 34.05.455.

[2] This section of the Board's rules requires parties appearing before the Boards to conform to the code of professional conduct applicable to attorneys.

(Emphasis supplied).

B. Discussion

The City of Sultan alleges that on April 27, 2006, an *ex parte* communication occurred between the members of this Board and Petitioners in this matter – Jocelynne Fallgatter and Jeff Kirkman. The setting was the Semiannual Joint Boards Meeting. Sultan Response, at 1-6.

As noted above, all the members of this Board attended the April 27, 2006 SemiAnnual Joint Boards Meeting in Olympia, Washington.[4] Generally, the purpose of the Joint Boards meetings is to allow members of all three Boards the opportunity to solicit comments and share information that will promote the goals and requirements of the Act. *See* RCW 36.70A.270(9) and WAC 242-02-076(2).

For the last half-dozen years, one of the mechanisms[5] the Joint Boards have relied upon to obtain feedback on the Boards' processes and procedures is the use of a "Stakeholders Roundtable." The Boards invite representatives of various interest groups to participate on the "Roundtable" and share their views of the GMA and the Boards' process and procedure. Roundtable participants typically include representatives of cities, counties, builders, realtors, or other industry groups, citizen or neighborhood organizations and representatives of various environmental groups. Stakeholder roundtables frequently have participants who have pending and/or prior cases before the Boards.[6] Roundtable participants are advised that comments on matters pending before any of the Boards are not permitted.[7] However, participants are encouraged to comment on how the Boards' processes and procedures may be improved or clarified.

Since many of the petitioners in Board cases are *pro se* litigants, this year the Boards sought to solicit input from various *pro se* petitioners from each of the three Board regions. Thus, the Joint Boards agenda for the April 27, 2006 meeting included time for a "*Pro Se* Roundtable." *See*, Sultan Response, Exhibit 2. Petitioners in this matter,

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[3] This section of the Board's rules authorizes the Board to dismiss an action for failure to adhere to the Board's rules. *See* WAC 242-02-720(4).

[4] The dates and general locations for the semiannual and annual Joint Boards meetings are established in WAC 242-02-076. The specific location, time and Agendas for these meetings are posted on the Boards' websites in advance of each Joint Boards meeting. The meetings are open to the public, and public comment is accepted.

[5] Biennially, the Boards also circulate a questionnaire survey to solicit feedback. The survey results are typically posted on the individual Board's websites.

[6] For example, at the April 27, 2006, roundtable, the attorney speaking for the Washington Association of Counties and one of the attorneys speaking for environmental organizations each had current matters pending before the Central Puget Sound board, which they avoided any comment on.

[7] *See* Sultan Response, Exhibit 1, letters from Holly Gadbaw, WWGMHB, to Jeff Kirkman and Jocelynn Fallgatter confirming attendance. The letters include the following notice, "Please note that the Boards are constrained by the rules applicable to quasi-judicial bodies from receiving any comments on matters currently before the Boards, including compliance issues."

Jocelynne Fallgatter and Jeff Kirkman, representing a view of *pro se* petitioners from the Central Puget Sound region, participated on this panel along with *pro se* litigants from the Western and Eastern Boards' regions.

Generally, the *pro se* petitioners suggested that the Boards offer a "guidebook" or "manual" to explain how to practice before the Boards. Participants suggested that such a "manual" should:

- define or clarify "legal" but generally unfamiliar terms [*i.e.* burden of proof, invalidity, relief];
- provide reference to, or the location of, the rules of professional conduct for attorneys;
- clarify the content of "the record," perhaps requiring it to be organized chronologically;
- list or reference the location of relevant statutes and Board decisions;
- provide sample "forms;" and
- clarify and explain the settlement and mediation process.

See Sultan Response, Exhibit 3, Excerpts of Transcript April 27, 2006 Semiannual Joint Boards Meeting (hereafter, **4/27/06 Transcript**), at 1-31.

The City of Sultan asserts that in their presentation Ms. Fallgatter and Mr. Kirkman strayed from general comment on practice and procedure before the Board and commented on issues before the Board concerning Sultan. Sultan Response, at 3. The City cites the following comment of Ms. Fallgatter as evidence of an ex parte communication, "Jeff has dubbed our city the poster child for why GMA was created and why the hearings Boards are necessary." *Id*. Citing 4/27/06 Transcript, at 13. Additionally, the City takes issue with Ms. Fallgatter's statement regarding having access to the Boards' review process, "I can't tell you what it means to us – and not just Jeff and I – but many of our fellow citizens who are counting on us to be able to bring about some change."

Neither of these comments rises to the level of an *ex parte* communication involving an issue in a pending matter before the CPS Board. The City's assertion on these comments is **without merit**.

Next, the City takes issue with comments offered in relation to the settlement and mediation process and Board member comment. In the quotations from the 4/27/06 Transcript quoted below, the portions noted in **bold** are the communications offered as evidence of ex parte communications by the City, meriting Board member disqualification.

> Fallgatter: An issue I would like to discuss that I think is of more substance and might be of more help to you though is the settlement and mediation process. That's something you encourage each time we come

in for a prehearing conference. And Jeff [Kirkman] and I have gone through that route. And when we went into it, we really felt that would be a good solution. We could fix the problem. The City could save face. And everyone could move on with their lives.

But I think our failing, as pro se petitioners, was we didn't know how to come up with some sort of settlement agreement that would be binding on the other party. Maybe that's simply a case of we got what we paid for because we couldn't hire an attorney to do our fighting for us.

But if there were some way that you could deal with the mediation and settlement process that gave it more of a binding enforcement, it would be more productive. I sort of feel we wasted our time that Margery Hite came down and mediated for us because, in the end, the settlement was not followed through on. We're no farther than we were back then.

So is it something that could be delegated to CTED? Where, if you have a mediation process – and I'm not talking for minor things – I'm talking where you have complicated issues or multiple issues, CTED could come in and not just do one settlement discussion, but then come in and do follow-up, maybe assist the jurisdiction in taking the time or taking actions that they need to take to come into compliance.

And there could be some sort of compliance hearing before the Board before at the end of a timeframe. You know, like, say, you have a settlement agreement. Six months later there is a hearing before the Board – just like the regular compliance hearing – and you determine whether or not the conditions of the settlement agreement have been upheld. Some way to delay dismissing the case would be helpful.
. . .

4/27/06 Transcript, at 15-17.

Kirkman: . . . I – I really don't have any complaints except I want to echo Joce's [Fallgatter] complaint as far as when mediation happens.

We did not go into a mediation understanding that basically, if the municipality, the City does not uphold its end of the bargain that your only alternative is really to take legal action. And that, I think, needs to be more clarified at the beginning of the mediation.

And even when you're doing the prehearing conference and say, "If you go down this route, if the municipality does not adhere to what is agreed, that your only alternative is to take legal action.

Id. at 19-20.

> Board member McGuire: A comment. I mean, I'm interested in the – in the settlement and mediation piece.
>
> I know Margery [Hite] sat down and tried to work something out. But I think the mediation or the settlement situations I've been in with the Western Board, I think the petitioners go in with often the most to lose, if they, in fact agree to something and then withdraw the petition for review, which I think happened in one of your cases.
>
> Kirkman: Yes.
>
> McGuire: What I think has typically happened is you get a settlement extension for 90 days. You don't withdraw the petition. And if 90 days isn't enough for the jurisdiction to act on something you've agreed to, then you get another one. But you don't dismiss that petition until some new action occurs. So – in other words, you're not forfeiting your right to appear before the Board.
>
> You know, once you pull the plug on your petition you're gone and we can't do anything. And then if the jurisdiction reneges or if you renege on something.
>
> So I think that's one way if you get involved in additional settlement situations, is you can agree to the extensions, but – sometimes it's going to take six, nine, or even a year, you know to get something done – you just keep extending it. We just keep pushing the dates out, but you don't lose your petition. And if the action doesn't occur, then we proceed on the calendar that's been set.
>
> So that's one way, **just to keep in mind for if you're in settlement discussions, you know, don't withdraw your petition or say "We're done" until you feel comfortable that something is going to happen**.
>
> **Because I think we're hard pressed to enforce a settlement agreement that you negotiate – I think CTED's in the same position – so all you have is keeping your petition alive until such time as something happens, and then you can challenge that or not**.
>
> Fallgatter: And I think we understand that now.
>
> McGuire: Okay.

Fallgatter: **But, you know – You know, we were naïve. And we wanted to be the "good guys" in the context of being the 'bad guys" that brought an appeal against the City.**

We had every intention of upholding our end of the agreement, which we did, and just assumed – you know, obviously, now we would – we would not agree to have dismissed [the PFR].

Id. at 20-22.

Unidentified Speaker [Board member]: So if in – at the prehearing conference, when settlement extensions are being discussed, if the petitioner is pro se – if the Board members used previous experiences as examples where whether a settlement - a settlement agreement is reached, unless, as Mr. McGuire said, unless the petition continues in effect, it's not – its no longer before the Board. Once the petition is withdrawn, there's nothing before the Board, including enforcement of the settlement agreement.

So if we articulated something to that effect, it would accomplish what you're thinking about in terms of *pro se* having more knowledge.

Kirkman: **Exactly. And, actually, it would help maybe because we're shy now. We – I mean, we've been hurt once in a big way. I don't think we'll ever walk in – We still speak to the City. I mean they sit down with us on any of the appeals and try to come up with settlement, but we – we basically are shying away from settling. Which sort of goes against, you know, the whole concept**.

Because if we could come up with a settlement – And understanding now that you can do the 90-day push forward and all that - it – It would be helpful in the sense that we would probably sit down and settle something that could be settled if. . .But, again, we have to have that knowledge.

Board member Margery Hite: **One of the things that you need to be aware that the Board is in the situation of is that the Board can't advocate for one side or the other and say to you, what – what happens if it doesn't come through or that kind of thing, puts the Board in the situation now of taking sides. And that makes it difficult.**

So it's a – it's a - We have a fine line to draw between trying to help the *pro ses* and having it go over that line to the place of advocating. It's a hard thing for the Board to take on..

Id. at 22-23.

The City asserts that the bolded comments are evidence that "Petitioners, at the invitation of the Board, crossed the line and solicited and received *ex parte* communications on *issues in this case*." Sultan Response, at 5; (emphasis supplied). The City continues, "Because of these communications, and the Board member responses, the City of Sultan can no longer be assured of a fair and impartial Board deciding this matter on the merits based on the record. The corrosive effect of Board-invited ex parte comments doom this proceeding and require dismissal." *Id*.

The entire quoted discussion from the Joint Boards meeting involved the settlement or mediation process. Petitioners relayed their experience with the settlement process and offered suggestions on how it might be improved to inform the parties of options. The fruit of their prior experience was a "Settlement Agreement" that resolved CPSGMHB Case No. 05-3-0010c, *Fallgatter III v. City of Sultan*. The Board's June 24, 2005 Order of Dismissal in that matter notes that at the request of the parties the petition for review was withdrawn and the matter dismissed. That matter was dismissed a year ago, in June of 2005; it was not before the Board on April 27, 2006, nor is it presently. The City's assertion that the April 27, 2006 Semiannual Joint Boards Meeting discussions regarding settlement and mediation procedures [where a prior experience was used as an example] crossed the line into ex parte communications regarding this present proceeding are **without merit**.

The Board notes that in the present matter – *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003 - 7 Legal Issues are posed for the Board to resolve. *See* January 23, 2006 Prehearing Order, at 5-6. None of the Legal Issues refers to compliance with any terms or conditions of the previous "Settlement Agreement" – which as noted at the Joint Boards meeting – the Boards do not enforce. Therefore, the Board concludes that there are no issues in this case that would implicate the April 27, 2006 exchanges as ex parte communications. The City's argument in this respect is **without merit**.

The Board, individually and collectively, declines to recuse itself from hearing the present matter. The Board has disclosed in this Order the relevant portions of the transcript where the alleged ex parte communications occurred. Each CPSGMHB member has reviewed this transcript and has determined that none of the comments offered by Petitioners, or responses by Board members, rises to the level of an ex parte communication that would suggest any Board member is biased, prejudiced or has an interest in the outcome of the present proceeding and should therefore be disqualified for cause. The City's motion to disqualify the Board and dismiss the petition for review because of improper ex parte communications is **denied**.

However, while none of Petitioners' Legal Issues in the present case are based upon enforcement of the settlement agreement, Petitioners reference the settlement agreement in their briefing and arguments. The City correctly points out that the settlement agreement is neither a comprehensive plan nor a development regulation; therefore the Board lacks jurisdiction to review it. Sultan Response, at 8. Nonetheless, the Board takes the City's objection as a motion to strike. On this point the City's motion to strike

reference to the settlement agreement is **granted**. The Board will ignore any reference to the settlement agreement from the briefs and arguments of the parties in its deliberations and crafting this decision.

III. ORDER

Based upon review of the April 27, 2006 Transcript, the Petition for Review, the Board's Rules of Practice and Procedure, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, prior orders by this Board and the other Growth Boards, case law, and having deliberated on the matter, the Board ORDERS:

- The City's motion to disqualify the Board and dismiss the petition for review because of improper ex parte communications is **denied**.

- The City's motion to strike reference to the settlement agreement in the parties' briefing is **granted**.

So ORDERED this 5th day of June, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Presiding Officer

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

APPENDIX A

RCW 34.05.455 provides:

> (1) A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection:
>
> (a) Where the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding;
>
> (b) Any presiding officer may receive aid from legal counsel, or from staff assistants who are subject to the presiding officer's supervision; and
>
> (c) Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.
>
> (d) This subsection does not apply to communications required for the disposition of ex parte matters specifically authorized by statute.
>
> (2) Unless required for the disposition of ex parte matters specifically authorized by statute or unless necessarily procedural aspects of maintaining an orderly process, a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.
>
> (3) Unless necessary to procedural aspects of maintaining an orderly process, persons whom a presiding officer may not communicate under subsections (1) and (2) of this section may not communicate with presiding officers without notice and opportunity for all persons to participate.
>
> (4) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (5) of this section.
>
> (5) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all

written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. Portions of the record pertaining to ex parte communications or rebuttals do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact at issue and that portion is admitted pursuant to RCW 34.05.452.

(6) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified, and the portions of the record pertaining to the communication may be sealed by protective order.

(7) The agency shall, and any party may, report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violation of this section.